



July 5, 2001

Mr. Frank J. Garza
City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2001-2881

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148898.

The City of San Antonio (the "city") received a request for information concerning an audit of Greater Kelly Development Association ("GKDA") conducted by the U.S. Department of Housing and Urban Development ("HUD"), specifically (1) a copy of the HUD audit of the \$20 million loan to the city for GKDA; (2) copies of all city hall internal memoranda and e-mails related to the audit, and (3) copies of all letters, memoranda, and e-mails to GKDA related to the audit. You have submitted to this office for review Exhibits B and C and explain Exhibit B contains information pertinent to item (1) above while Exhibit C contains information pertinent to items (2) and (3) above. In addition, you state that the city has notified HUD, Southwest District Office of the Inspector General of the request as they are a potentially interested third party.¹ Gov't Code § 552.304. You will release all other portions of the requested information that you believe are open to the public. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹ To date, this office has not received any correspondence from the Office of Inspector General concerning this request.

Initially, we note that you claim the requested HUD audit report does not constitute a request for public information because it is not a completed audit under section 552.022(a)(1). Section 552.022(a)(1) provides that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is made expressly public except as otherwise provided by section 552.108 of the Government Code or if confidential under other law. However, section 552.022 does not serve as an exhaustive list of public information or as an exception to the release of information. Rather, it lists eighteen categories of public information that generally may be withheld only if confidential by law, or, in the case of completed reports, investigations, evaluations, and audits, is excepted under section 552.108 of the Government Code. *See* Gov't Code § 552.022 (section 552.022(a) expressly states that it does not limit "the amount or kind of information that is public information under this chapter."). Therefore, you may not withhold the draft HUD audit report under section 552.022.

First, you contend that Exhibits B and C are excepted from disclosure under section 552.101 of the Government Code because the cover letter attached to the HUD audit report specifically mandates that the city not disclose or reproduce the HUD audit report without the consent of the Office of Inspector General. You rely on the deliberative process exception provided for in the federal Freedom of Information Act. Title 5 U.S.C. § 552(b)(5).² Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 incorporates the confidentiality provisions of federal statutes and regulations. For example, certain federal laws may govern whether a state or local agency may release a social security number. *See* Open Records Decision No. 622 at 3-4 (1994) (concluding that certain social security numbers are confidential under federal law).

As a general rule, however, the mere fact that information held by a federal agency is excepted from disclosure under the federal Freedom of Information Act does not necessarily except the same information from disclosure under the Public Information Act (the "Act") when it is held by a Texas governmental body. Attorney General Opinion MW-95 at 2 (1979); Open Records Decision No. 124 at 1 (1976). Moreover, the Office of Inspector General has not determined that the HUD audit report is confidential under federal law so as to bring it within the section 552.101 exception. Furthermore, neither the city nor the HUD has provided this office with any express authority that permits the HUD to require a state agency to withhold the information and ignore a state statute such as the Act. *See* JM-830 (1987) (EEOC lacks authority to seal personnel records and require state agency to ignore Act). Consequently, the city may not withhold Exhibits B and C under section 552.101 of the Government Code.

² Section 552(b) of Title 5 of the United States Code states, "[t]his section does not apply to matters that are - (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]" 5 U.S.C. § 552(b)(5).

Second, you assert Exhibits B and C contain audit working papers excepted from disclosure under section 552.116. Section 552.116 of the Government Code excepts from disclosure “[a]n audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education.” The audit working papers you have submitted are from an audit conducted by HUD, a federal agency, not the state auditor or the auditor of a state agency or institution of higher education. Therefore, section 552.116 is not applicable in this instance. Thus, the city may not withhold Exhibits B and C under section 552.116 of the Government Code.

Third, you rely on Open Records Decision No. 588 (1991) and contend Exhibits B and C are excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the litigation section, states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c).

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information “relates” to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.).

In Open Records Decision No. 588 (1991), this office stated that “litigation” for purposes of the statutory predecessor to section 552.103(a)(1) “includes contested cases conducted in a quasi-judicial forum.” *Id.* at 2. Moreover, in Open Records Decision No. 301 (1982) we stated:

The [Public Information Act (the "act")] does not define "litigation." However, the section [552.103] exception was designed to protect the interests of the state [or a political subdivision] in adversary proceedings or in negotiations leading to the settlement thereof, and we have no doubt that "litigation" encompasses proceedings conducted in quasi-judicial forums as well as strictly judicial ones. "Litigation" has been defined by the dictionary to include "a controversy involving adverse parties before an executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures." Webster's Third International Dictionary at 1322. See *San Antonio Public Service Company v. Long*, 72 S.W.2d 696 (Tex. Civ. App. - San Antonio 1934, no writ). See also V.T.C.S. art. 6252-13a, § 19. Thus, the dispute before an administrative agency may be moved to a judicial forum. The lawsuit is in effect a continuation of the same controversy. We believe the litigation exception may be applied to records relating to a contested case before an administrative agency.

Open Records Decision No. 301 at 1-2 (1982). This office has focused on the following factors in determining whether an administrative proceeding is conducted in a quasi-judicial forum: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. See Open Records Decision No. 588 (1991).

You state that in the event the findings of the HUD audit cannot be resolved, the city is provided the right to challenge the findings of any final determination through administrative proceedings before a Federal Administrative Law Judge. You further state that the city does not currently agree with the findings of the draft audit and, unless otherwise resolved, the city must exhaust all administrative remedies prior to seeking recourse via the courts. You have neither provided this office or cited to any rules or provisions governing contested HUD audits, nor adequately explained how the HUD's proceeding amounts to "litigation" for purposes of section 552.103(a). Therefore, we conclude that litigation is not reasonably anticipated in this instance, and that the city may not withhold Exhibits B and C under section 552.103(a) of the Government Code.

Last, you contend Exhibits B and C contain a draft document and related information that are protected from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal

communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

Portions of Exhibit C contain advice, recommendations, opinions, and other material reflecting the policymaking processes of the city that are excepted from disclosure under section 552.111. We have marked those portions of Exhibit C the city may withhold under section 552.111 of the Government Code. The remainder of Exhibit C must be released to the requestor.

Exhibit B is a draft audit report from HUD. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990). Upon review of Exhibit B, we conclude that the city and HUD do not share a privity of interest or common deliberative process with regard to the policy matter at issue. Thus, we conclude that Exhibit B is not excepted under section 552.111, and the city must release Exhibit B.

In summary, the city must release Exhibit B in its entirety and portions of Exhibit C to the requestor. The remaining portions of Exhibit C may be withheld under section 552.111 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

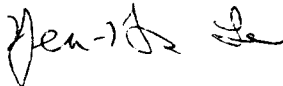
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref: ID# 148898

Enc. Marked documents

cc: Mr. Roddy Stinson
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(w/o enclosures)